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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**

8  
9 Armando Nieves Martinez, et al.,

No. CV-13-00955-TUC-CKJ (LAB)

10 Plaintiffs,

**ORDER**

11 v.

12 United States of America,

13 Defendant.

14

15 On October 11, 2017, the Magistrate Judge issued a Report and Recommendation  
16 (“R&R”) (Doc. 150) in which she recommended that this Court deny Plaintiffs’ Motion  
17 for Summary Judgment (Doc. 127). After the R&R issued, the Government filed  
18 objections (Doc. 151), Plaintiffs a response (Doc. 152), and the Government a reply  
19 (Doc. 153).

20 The Government’s Motion for Summary Judgment asks the Court to dismiss  
21 Plaintiffs’ claims under the Federal Tort Claims Act (“FTCA”) of negligence, gross  
22 negligence, assault, false imprisonment, and intentional infliction of emotional distress.  
23 The allegations stem from a U.S. Border Patrol checkpoint stop, interrogation, and  
24 incarceration, in which the Plaintiffs were accused of transporting methamphetamine.  
25 (Doc. 20 at 2-6.) Ultimately, no drugs were found in Plaintiffs’ vehicle. (*Id.* at 7.) The  
26 Government contends the actions of Border Patrol agents lie within the discretionary  
27 function exception, precluding any liability under the FTCA. (Doc. 127 at 1.) Upon  
28 review, the Court finds that Plaintiffs’ claims are precluded, and grants the Government’s

1 Motion for Summary Judgment as to Plaintiffs' claims of negligence, gross negligence,  
2 assault, and false imprisonment. However, the Court finds Plaintiffs' intentional infliction  
3 of emotional distress claim raises a genuine issue of material fact and is not precluded  
4 under FTCA. The Court, therefore, denies summary judgment as to this issue.

5 ***Standard of Review***

6     • ***Objections to R&R***

7         The standard of review that is applied to a magistrate judge's report and  
8 recommendation is dependent upon whether a party files objections – the Court need not  
9 review portions of a report to which a party does not object. *Thomas v. Arn*, 474 U.S.  
10 140, 150 (1985). However, the Court must “determine *de novo* any part of the magistrate  
11 judge’s disposition that has been properly objected to. The district judge may accept,  
12 reject, or modify the recommended disposition; receive further evidence; or return the  
13 matter to the magistrate judge with instructions.” Fed.R.Civ.P. 72(b)(3); *see also* 28  
14 U.S.C. § 636(b)(1). Nonetheless, “while the statute does not require the judge to review  
15 an issue *de novo* if no objections are filed, it does not preclude further review by the  
16 district judge, *sua sponte* or at the request of a party, under a *de novo* or any other  
17 standard.” *Thomas*, 474 U.S. at 154.

18     • ***Summary Judgment***

19         A court must grant summary judgment “if the movant shows that there is no  
20 genuine dispute as to any material fact and the movant is entitled to judgment as a matter  
21 of law.” Fed.R.Civ.P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23  
22 (1986). A genuine dispute exists “if the evidence is such that a reasonable jury could  
23 return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,  
24 248 (1986).

25         The movant bears the initial responsibility of presenting the basis for its motion  
26 and identifying those portions of the record, together with affidavits, if any, that it  
27 believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at  
28 323. If the moving party carries “the burden of proof on an issue at trial, the movant must  
affirmatively demonstrate that no reasonable trier of fact could find other than for the

1 moving party.” *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007).  
2 However, if the burden rests on the non-moving party, “the moving party need only prove  
3 that there is an absence of evidence to support the non-moving party’s case.” *In re Oracle*  
4 *Corp. Secs. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010).

5 If the movant fails to carry its initial burden of production, the nonmovant need  
6 not produce anything. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Co., Inc.*, 210 F.3d  
7 1099, 1102-03 (9th Cir. 2000). But, if the movant meets its initial responsibility, the  
8 burden shifts to the nonmovant to demonstrate the existence of a factual dispute and to  
9 show the fact in contention is material—i.e., a fact that might affect the outcome of the  
10 suit under the governing law—and that the dispute is genuine. *Anderson*, 477 U.S. at  
11 248, 250; *see also Triton Energy Corp. v. Square D. Co.*, 68 F.3d 1216, 1221 (9th Cir.  
12 1995). The nonmovant need not establish a material issue of fact conclusively in its  
13 favor, *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968);  
14 however, it must “come forward with specific facts showing that there is a genuine issue  
15 for trial.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587  
16 (1986) (internal citation omitted); *see Fed.R.Civ.P. 56(c)(1)*.

17 At summary judgment, the judge’s function is not to weigh the evidence and  
18 determine the truth, but to determine whether there is a genuine issue for trial. *Anderson*,  
19 477 U.S. at 249. In its analysis, the court must believe the nonmovant’s evidence and  
20 draw all inferences in the nonmovant’s favor. *Id.* at 255. “The court need consider only  
21 the cited materials, but it may consider any other materials in the record.” Fed.R.Civ.P.  
22 56(c)(3). If, after considering the arguments and materials in the record, it appears that  
23 jurors of reason could find by a preponderance of the evidence that the defendant is  
24 liable, then the court should not grant summary judgment. *Cornwell v. Electra Cent.*  
25 *Credit Union*, 439 F.3d 1018, 1027-28 (9th Cir. 2008). If, however, jurors of reason  
26 could not determine that plaintiff is entitled to a judgment in his favor, then summary  
27 judgment is appropriate. *Id.* at 1028.

28 Under this standard, the Court is only to consider admissible evidence. *Moran v.*  
*Selig*, 447 F.3d 748, 759-60 (9th Cir. 2006) (pleading and opposition must be verified to

1 constitute opposing affidavits); *FDIC v. New Hampshire Ins. Co.*, 953 F.2d 478, 484 (9th  
2 Cir. 1991) (declarations and other evidence that would not be admissible may be  
3 stricken). A “genuine” issue of “material” fact cannot be created by a party simply  
4 making assertions in its legal memoranda. *See Varig Airlines v. Walter Kidde & Co.*, 690  
5 F.2d 1235, 1238 (1982). Indeed, a “conclusory, self-serving affidavit, lacking detailed  
6 facts and any supporting evidence, is insufficient to create a genuine issue of material  
7 fact.” *Nilsson v. City of Mesa*, 503 F.3d 947, 952 n.2 (9th Cir. 2007). Moreover,  
8 statements must allege personal knowledge. *See Skillsky v. Lucky Stores, Inc.*, 893 F.2d  
9 1088, 1091 (9th Cir. 1990) (“Like affidavits, deposition testimony that is not based on  
10 personal knowledge and is hearsay is inadmissible and cannot raise a genuine issue of  
11 material fact sufficient to withstand summary judgment.”). Speculation is not competent  
12 evidence. *Huggins v. Deinhard*, 134 Ariz. 98, 104, 654 P.2d 32, 38 (App. 1982); *Nelson*  
13 *v. Pima Cnty. College*, 85 F.3d 1075, 1081-82 (9th Cir. 1996) (“mere allegation and  
14 speculation do not create a factual dispute for purposes of summary judgment”);  
15 *Soremekun*, 509 F.3d at 985 (conclusory, speculative testimony in affidavits and moving  
16 papers is insufficient to raise genuine issues of fact and defeat summary judgment).

17 ***Factual and Procedural History***

18 The parties do not object to the Magistrate Judge’s factual determinations. The  
19 Court has reviewed and adopts the Magistrate Judge’s factual and procedural history.

20 ***Federal Tort Claims Act and the Discretionary Function Exception***

21 The FTCA “is the exclusive remedy for tortious conduct by the United States.”  
22 *Federal Deposit Ins. Corp. v. Craft*, 157 F.3d 697, 706 (9th Cir. 1998); 28 U.S.C. § 2679.  
23 Under the FTCA, liability may be imposed “under circumstances where the United  
24 States, if a private person, would be liable to the claimant in accordance with the law of  
25 the place where the act or omission occurred.” 28 U.S.C. § 1346(b); *see also United*  
26 *States. v. Olsen*, 546 U.S. 43, 44 (2005).

27 However, this Court may not exercise jurisdiction over FTCA claims in which the  
28 United States has not “unequivocally expressed” that it has waived its sovereign  
immunity. *United States v. White Mt. Apache Tribe*, 537 U.S. 465, 472 (2003). In

1 addition, the factual allegations in a petitioner’s claim must “fall[] within the terms of the  
2 waiver.” *Id.* The United States’ maintains sovereign immunity when a claim arises under  
3 the discretionary function exception. This exception applies to:

4 [a]ny claim based upon an act or omission of an employee of the  
5 Government, exercising due care, in the execution of a statute or regulation,  
6 whether or not such statute or regulation be valid, or based upon the  
7 exercise or performance or the failure to exercise or perform a discretionary  
8 function or duty on the part of a federal agency or an employee of the  
9 Government, *whether or not the discretion involved be abused.*

10 28 U.S.C. § 2680(a) (emphasis added).

11 “In order to determine whether the discretionary function exception applies, the  
12 court must engage in a two-step inquiry.” *Nurse v. United States*, 226 F.3d 996, 1001 (9th  
13 Cir. 2000). The threshold question for the court is “whether the challenged conduct  
14 involves an element of judgment or choice.” *Id.* “The requirement of judgment or choice  
15 is not satisfied if a federal statute, regulation, or policy specifically prescribes a course of  
16 action for an employee to follow, because the employee has no rightful option but to  
17 adhere to the directive.” *United States v. Gaubert*, 499 U.S. 315, 322 (1991) (internal  
18 citations and quotations omitted). However, an agency’s conduct involves an element of  
19 choice when “no statute or agency policy dictates the precise manner in which the agency  
20 is to complete the challenged task.” *Green v. United States*, 630 F.3d 1245, 1249-50 (9th  
21 Cir. 2011) (*citing Childers v. United States*, 40 F.3d 973, 976 (9th Cir. 1995)).

22 If the conduct involved a choice, the second part of the inquiry is “whether that  
23 judgment is of the kind that the discretionary function exception was designed to shield.”  
24 *Id.* (*citing Gaubert*, 499 U.S. at 322-23); *see also United States v. Varig Airlines*, 467  
25 U.S. 797, 813 (1984). The shield covers actions that “involve[] considerations of social,  
26 economic, or political policy.” *Sabow v. United States*, 93 F.3d 1445, 1451 (9th Cir.  
27 1996). “[I]f a regulation allows the employee discretion, the very existence of the  
28 regulation creates a strong presumption that a discretionary act authorized by the  
regulation involves consideration of the same policies which led to the promulgation of  
the regulations.” *Gaubert*, 499 U.S. at 323-24. “The determination of whether given  
conduct falls within the discretionary function exception must focus on the ‘nature of the

1 conduct, rather than the status of the actor.”” *Nurse*, 226 F.3d at 996 (quoting *Gaubert*,  
2 499 U.S. at 322).

3 “If the challenged action satisfies both []prongs, that action is immune from suit—  
4 and federal courts lack subject matter jurisdiction—*even if the court thinks the  
5 government abused its discretion or made the wrong choice.*” *Green*, 630 F.3d at 1249-50  
6 (emphasis added). At summary judgment, the Government must affirmatively establish  
7 the exceptions’ applicability to strip the district court of jurisdiction. *O’Toole v. United  
8 States*, 295 F.3d 1029, 1032 (9th Cir. 2002).

9 ***Criminal Investigation***

10 • ***Discretionary Decisions in Criminal Investigation***

11 In this instance, the Court must first address whether the executive branch has  
12 given the U.S. Border Patrol discretion for the agents’ actions during its criminal  
13 investigation of the Martinez family.

14 The Magistrate Judge conceded that the agents’ investigation and arrest were  
15 discretionary, and not subject to mandatory regulations. (Doc. 150 at 9.) Furthermore,  
16 Plaintiffs do not dispute agents’ discretion, nor provide any mandatory regulations which  
17 outline specified conduct agents must follow during a criminal investigation.

18 • ***Indian Towing Analysis***

19 The R&R determined that while the decisions to investigate were discretionary,  
20 when agents made those decisions they could not do it in a “slipshod manner.” (Doc. 150  
21 at 9.) Therefore, agents’ poor investigative techniques raise a genuine issue for trial. (*Id.*)  
22 To come to her decision, the Magistrate Judge primarily used a line of cases starting with  
23 *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955). This case and the cases  
24 following its reasoning essentially state that the government may make discretionary  
25 choices, but once made, there is an obligation to exercise due care in implementing these  
26 choices.

27 The Government asserts that *Indian Towing* and its progeny do not apply to  
28 criminal law enforcement investigations, but rather to ministerial decisions, or design-  
implementation determinations. (Doc. 151 at 3 (*citing Gonzalez v. United States*, 814

1 F.3d 1022, 1035 (9th Cir. 2016)). It argues that the *Indian Towing* analysis is also no  
2 longer applicable to the discretionary function exception; a change noted in *Gaubert*, 499  
3 U.S. at 325. (Doc. 151 at 3-4); *see e.g.*, *Harrell v. United States*, 443 F.3d 1231, 1237  
4 (10th Cir. 2006) (“Since *Gaubert*, several Circuit Courts of Appeals . . . have expressly  
5 recognized that *Indian Towing* is simply not persuasive authority in the context of the  
6 discretionary function exception.”) The Government claims the Ninth Circuit evaluates  
7 criminal investigations based only on the two-fold test, not the more stringent design-  
8 implementation sub-test used by the Magistrate Judge. (Doc. 151 at 5.)

9 Like the Magistrate Judge, Plaintiffs argue that agents were required to exercise  
10 due care in their investigation. (Doc. 153 at 3.) Plaintiffs also posit that their  
11 constitutional rights were violated when they were held without probable cause because  
12 of a negligent canine search, negligent drug testing, and an unlawful interrogation. (Doc.  
13 153 at 2, 4.) However, Plaintiffs’ support includes only case law issued prior to the  
14 *Gaubert* decision, cases that were not pursuant to criminal investigations, or cases that  
15 are factually distinguishable.

16 The Court finds that the Ninth Circuit has rejected analyzing criminal  
17 investigations under the *Indian Towing* standard, and the two-prong test is appropriate to  
18 determine if the discretionary function applies. *See Gonzales*, 814 F.3d at 1034-35; *see also Alfrey v. United States*, 276 F.3d 557, 567 (9th Cir. 2002). Furthermore, as  
19 conceded by Plaintiffs, criminal law enforcement investigations are discretionary and are  
20 covered by the discretionary function exception if the actions also implicate policy  
21 concerns. *See Sabow*, 93 F.3d at 1452; *Gasho v. United States*, 39 F.3d 1420, 1435 (9th  
22 Cir. 1994).

23 • ***Policy Concerns in Law Enforcement Investigation***

24 The only remaining issue is whether the actions implicated concerns about “social,  
25 economic, or political policy.” *Sabow*, 93 F.3d at 1451.

26 “The investigation of crime involves policy judgments at the core of the executive  
27 branch. In investigations . . . the executive must consider the reliability of the  
28 information, the relative importance of the crime, and the agency’s mission and

1 resources.” *Gonzalez*, 814 F.3d at 1032; *Kearns v. United States*, CV 4-1937 PHX-NVW,  
2 2007 WL 552227 at \*21 (D. Ariz. Feb 21, 2007), rev’d and remanded on other grounds,  
3 07-15769, 2009 WL 226207 (9th Cir. Jan. 28, 2009) (“As a general matter, once the  
4 decision to investigate is made, “Congress did not intend to provide for judicial review of  
5 the quality of the investigation as judged by the outcome.”).

6 The policy basis for an investigation is not undermined by incompetence or abuse  
7 of discretion. “Investigations by federal law enforcement officials . . . clearly require  
8 investigative officers to consider relevant political and social circumstances in making  
9 decisions about the nature and scope of a criminal investigation. . . . [A]s long as conduct  
10 is discretionary and of the type meant to be protected by the discretionary function  
11 exception, the exception applies even where a government actor abuses his or her  
12 discretion and even where the conduct is tortious or demonstrates poor judgment.”  
13 *Parker v. United States*, CV 10-1407-PHX-SRB, 2011 WL 13189942, at \*6–7 (D. Ariz.  
14 May 6, 2011), *aff’d*, 500 Fed. Appx. 630 (9th Cir. 2012) (*citing Sabow*, 93 F.3d at 1452  
15 n.6, 1453-54); *Gasho*, 39 F.3d at 1435; 28 U.S.C. § 2680(a)). The exception applies to  
16 criminal investigative actions even if they are appalling, negligent, or bad investigative  
17 technique. *See e.g.*, *Alfrey*, 276 F.3d at 565-66 (FBI’s actions were “alarming instances of  
18 poor judgment and a general disregard for sound investigative procedure,” but still  
19 implicated policy considerations); *see also Casillas v. United States*, CV 07-395-TUC-  
20 DCB (HCE), 2009 WL 735193 at \*12 (D. Ariz. 2009), *report and recommendation  
adopted*, 2009 WL 735188 (D. Ariz. 2009) (obtaining search warrant with errors in the  
21 affidavit still implicated policy concerns of protecting the public from criminal activity);  
22 *Tsolmon v. United States*, CV 13-3434, 2015 WL 5093412 at \*11 (S.D. Tex. Aug. 28,  
23 2015) *aff’d*, 841 F.3d 378 (5th Cir. 2016) (Incompetence and drawing wrong conclusion  
24 from evidence “do[es] not establish the egregious bad faith or intentional misconduct that  
25 courts have construed to be nondiscretionary conduct.”).

26 Moreover, whether an action implicates policy considerations does not depend on  
27 the “agent’s subjective intent in exercising discretion . . . but on the nature of the actions  
28 and on whether they are susceptible to policy analysis.” *Gaubert*, 499 U.S. at 325. “In

1 other words, what matters is the type of decision being challenged not what the  
2 decisionmaker was thinking at the time.” *Davis v. United States*, 196 F. Supp. 3d 106,  
3 118 (D.D.C. 2016) (internal quotations omitted).

4 With few exceptions, the Ninth Circuit has found that a discretionary criminal  
5 investigation is covered by the discretionary function exception *unless*: (1) there was  
6 actually a mandatory guideline the agent needed to follow and did not, or (2) there was  
7 truly no logical basis for the agents’ actions (i.e. choice was based on a constitutional  
8 violation or otherwise was not a viable way to further an investigation), *see, e.g.*, *Sabow*,  
9 93 F.3d at 1454; *see also Patel v. United States*, 806 F.Supp. 873, 878 (N.D.Cal. 1992).

10 ***Tort Claims Under the Discretionary Function Exception***

11 The Government also maintains sovereign immunity for certain types of tortious  
12 conduct. 28 U.S.C. § 2680(h). However, the “law enforcement proviso” limits this  
13 immunity, providing an avenue for relief to a petitioner when the tort is committed by a  
14 law enforcement officer. “On its face, the law enforcement proviso applies where a claim  
15 both arises out of one of the proviso’s six intentional torts [assault, battery, false  
16 imprisonment, false arrest, abuse of process, or malicious prosecution], and is related to  
17 the ‘acts or omissions’ of an ‘investigative or law enforcement officer’ . . . who is “acting  
18 within the scope of his office or employment.” *Millbrook v. United States*, 569 U.S. 50,  
19 55 (2013) (quoting 28 U.S.C. § 1346(b)); *see also Arnsburg v. United States*, 757 F.2d  
20 971, 978 (9th Cir. 1985). But, the Ninth Circuit has concluded that even where the law  
21 enforcement proviso applies, the discretionary function exception trumps the proviso. *See*  
22 *e.g.*, *Nurse*, 226 F.3d at 1002–03.

23 Therefore, where a defendant can demonstrate that “the tortious conduct involves  
24 a ‘discretionary function,’ a plaintiff cannot maintain an FTCA claim, even if the  
25 discretionary act constitutes an intentional tort under § 2680(h).” *Gasho*, 39 F.3d at 1435  
26 (citing *Wright v. United States*, 719 F.2d 1032, 1035 (9th Cir. 1983)); *Gray v. Bell*, 712  
27 F.2d at 507-08 (D.C. Cir. 1983) (plain language of 28 U.S.C. § 2680 applies to *any claim*  
28 based on a discretionary function).

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1       • *Analysis*

2              Plaintiffs argue the agents' actions were negligent, shoddy, and abusive.  
3              Therefore, the actions cannot be grounded in policy considerations. This is a backwards  
4              approach, allowing only good discretionary decisions to be immune from suit. This is not  
5              the purpose of the discretionary function exception.

6              To the contrary, the Court finds that the types of decisions made by Border Patrol  
7              agents implicated the policy concern of discouraging the importation of illegal  
8              substances. These decisions included: conducting a canine search; administering drug  
9              tests; separating, detaining, and interrogating Plaintiffs; and presenting the affidavit of  
10             probable cause to a magistrate judge. Each stage required discretionary choices:  
11             evaluating the time, energy, and resources to put into the investigation to further the goal  
12             of preventing drug trafficking. The discretionary function exception applies to the alleged  
13             negligent actions. 28 U.S.C. § 2680(a); *see Alfrey*, 275 F.3d at 559. It also precludes  
14             Plaintiffs' claims of assault and false imprisonment. *See Gasho*, 39 F.3d at 1435;  
15             *Sheehan v. United States*, 896 F.2d 1168, (9th Cir. 1990).

16              The conclusion that poorly implemented actions are not covered by the exception  
17              also fails because it evaluates the exception under a subjective rather than objective  
18              standard. For example, looking at the details of agents' interrogative techniques requires  
19              the Court to delve into the subjective intent of the agent for each question during the  
20              interrogation, rather than looking to the objective policy consideration underlying  
21              interrogations in general. Our circuit rejects this subjective analysis. *Gonzalez*, 814 F.3d  
22             at 1033; *see also Nurse*, 226 F.3d at 996.

23              The case law is clear, even an incompetent investigation is immune from suit  
24              under the FTCA when the actions are discretionary and implicate public policy. As a  
25              matter of law, the agents' criminal investigation and arrest is precluded from review by  
26              this Court under the discretionary function exception.

27              The only additional manner in which Plaintiffs' claims may proceed under the  
28              FTCA is if Plaintiffs present a viable claim that a constitutional violation occurred, or a  
            viable claim of intentional infliction of emotional distress.

1           ***False Imprisonment***

2           Plaintiffs' claim of false imprisonment is precluded under the discretionary  
3 function exception. However, Plaintiffs allege a constitutional violation occurred because  
4 Border Patrol agents detained the Martinez family without probable cause. (Doc. 153 at  
5.) Plaintiffs assert that the magistrate judge would not have found probable cause for  
6 arrest had agents included exculpatory information in the Border Patrols' affidavit for  
7 probable cause. (*Id.*)

8           "[T]he Constitution can limit the discretion of federal officials such that the  
9 FTCA's discretionary function exception will not apply." *Galvin v. Hay*, 374 F.3d at 758.

10          Nonetheless, under the FTCA, "suits against the United States are governed by the  
11 substantive law of the place where the act or omission complained of occurs."

12          *McMurray v. United States*, 918 F.2d 834, 836 (9th Cir. 1990). Under Arizona law, false  
13 imprisonment occurs when a person is detained "without his consent and without lawful  
14 authority." *Slade v. City of Phoenix*, 541 P.2d 550, 552 (Ariz. 1975). "A detention which  
15 occurs pursuant to legal authority, such as a valid warrant, is not an unlawful detention. . .  
16 . [i]f the arrest or imprisonment has occurred pursuant to valid legal process, the fact that  
17 the action was procured maliciously and without probable cause does not constitute false  
18 arrest or false imprisonment." *Id.* (internal citations omitted).

19          Border Patrol agents have authority to make an arrest if the agent has reason to  
20 believe a felony has occurred or is in the process of being committed, but the arrestee  
21 must be "taken without unnecessary delay" before a judge for a probable cause  
22 determination. 8 U.S.C. § 1357(a)(4)). An officer has probable cause to arrest when he is  
23 provided "reasonably trustworthy information of facts and circumstances sufficient to  
24 lead a reasonable man to believe an offense is being or has been committed and that the  
25 person to be arrested committed it." *Hansen v Garcia*, 713 P.2d 1263, 1265 (Ariz. Ct.  
26 App. 1986). "Thus, the critical inquiry is to the facts as they existed at the time of the  
27 arrest, and not afterward." *Reams v. City of Tucson*, 701 P.2d 598, 601 (Ariz. App. 1985).  
28 "After-the-fact judicial participation cannot validate an unlawful arrest." *Id.* at 602.  
"Whether a given state of facts constitutes probable cause is always a question of law to

1 be determined by the court.” *Cullison v. City of Peoria*, 584 P.2d 1156, 1159 (Ariz.  
2 1978).

3 A preliminary hearing determination is generally sufficient to establish probable  
4 cause “so long as the evidence known to the arresting officers is not materially different  
5 from the evidence presented at the preliminary hearing.” *Wige v. City of Los Angeles*, 713  
6 F.3d 1183, 1185 (9th Cir. 2013). Issues presented to a magistrate judge for a probable  
7 cause determination are “materially different” when: (1) “the plaintiff alleges that the  
8 arresting officer lied or fabricated evidence presented at the preliminary hearing,” or (2)  
9 when “additional evidence not available to the officers at the time of the arrest is  
10 presented at the preliminary hearing.” *Id.* at 1186. Under the second exception, a plaintiff  
11 may litigate the issue of probable cause “with the falsified evidence removed from the  
12 equation or, in cases involving intentional concealment of exculpatory evidence, with the  
13 undisclosed evidence added back into the equation.” *Id.* Plaintiff must demonstrate not  
14 only that there was a deliberate or reckless omission, but must also show that the  
15 omission was “material to the finding of probable cause.” *Smith v. Almada*, 640 F.3d 931,  
16 937 (9th Cir. 2011) (*quoting KRL v. Moore*, 384 F.3d 1105, 1107 (9th Cir. 2011)).

17 Plaintiffs do not contend that officers presented false evidence. Nor do they allege  
18 information that was not available at the time of arrest was presented at the preliminary  
19 hearing. Plaintiffs argue the facts presented for probable cause were “materially  
20 different” because: (1) agents did not inform the court that the canine handler was  
21 predisposed to believe the vehicle had drugs, (2) agents failed to tell the magistrate judge  
22 that the instructions for the drug test were not correctly implemented, (3) agents did not  
23 include Martinez’s subsequent retraction of his confession or include that they used  
24 unreliable techniques for obtaining the confession. (Doc. 153 at 9.) Because this evidence  
25 could be perceived as “materially different,” they argue there was a genuine issue of  
26 whether agents had probable cause for arrest. (Doc. 150 at 13.)

27 The Government says that the process was lawful and therefore precluded  
28 because: (1) agents had probable cause to believe a felony was in progress, (2) Plaintiffs  
were read their *Miranda* warnings before Mr. Martinez confessed, and (3) the case

1 against Mr. Martinez was presented to a magistrate judge the next day, wherein the judge  
2 confirmed that agents had probable cause for arrest. (Doc. 127 at 15.)

3 • *Analysis*

4 The Court addresses each allegation that the affidavit was “materially different”  
5 separately: during the canine sniff, the drug test, and the confession. The Court finds that  
6 Plaintiffs’ argument that the family was held without probable cause fails for three  
7 reasons. First, the detention was pursuant to a valid legal process. Second, Plaintiffs’  
8 arguments require the Court to look at the evidence in hindsight. Finally, even with the  
9 exculpatory evidence included, there was sufficient evidence for a probable cause  
10 determination. Viewing the facts in favor of Plaintiffs, there is no genuine material issue  
11 of fact as to whether there was lawful authority for the detainment, and summary  
12 judgment is appropriate.

13 In his statement of probable cause, Agent Brian Derryberry noted that he had  
14 received information that liquid methamphetamine was discovered destined for Phoenix.  
15 *United States v. Nieves-Martinez*, No. CR 11-01812-PHX-DGC, Doc. 1 at 5. The  
16 affidavit stated the following. CBP Agent Roden’s canine drug dog alerted twice on  
17 Plaintiffs’ vehicle. *Id.* In secondary, the windshield wiper fluid tested positive for  
18 methamphetamine. *Id.* Mr. Martinez was given his *Miranda* warnings and waived his  
19 right to counsel. *Id.* “He stated that he did not know about anything about the drugs in his  
20 vehicle . . . and did not need to engage in such activities for money.” *Id.* After discussing  
21 the matter with his wife and son, Mr. Martinez admitted he left his vehicle in a repair  
22 shop and arranged a deal to receive \$10,000 in return for driving the vehicle into the  
23 United States. *Id.* Furthermore, Derryberry noted that the windshield wiper fluid was  
24 being treated as hazardous, and samples taken for further testing. *Id.* at 7-8.

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1           • *Canine Alert*

2           The Magistrate Judge determined that “[a] K9 alert may provide probable cause  
3 but only if the circumstances surrounding the alert are indicative of reliability” and stated  
4 that Agent Roden’s decision to stop the canine after it sniffed, muscles tightened, and  
5 head snapped back preempted a full alert. (Doc. 150 at 10.) Without the full alert, the  
6 Magistrate Judge contended that Plaintiffs may have been held without probable cause.  
7 (*Id.*) Plaintiffs also argued that Agent Roden was predisposed to find drugs in Plaintiffs’  
8 vehicle, and because of this, Plaintiffs were held without probable cause. (Doc. 153 at 9.)  
9 This information was never relayed to the magistrate judge for the probable cause  
10 proceedings.

11           Plaintiffs presented expert testimony from canine expert Edward Dobbertin.  
12 Dobbertin based his evaluation on the deposition of Agent Roden. (Exh. 10, Doc. 137-7,  
13 pp. 1-40.) He conceded that Loti, Agent Roden’s canine, had behavioral changes  
14 corresponding with an alert, but believed Roden should have taken additional steps to  
15 make sure the odor was from an illegal substance. (*Id.* at 4.) However, Dobbertin  
16 conceded that all dogs alert differently, and that an alert is a subjective determination by  
17 the handler. (*Id.* at 11.) He also admitted that Agent Roden stated that his dog did alert,  
18 but Dobbertin felt that that “alert” meant Roden did not let the dog finish the alert by  
19 sitting down. (*Id.* at 4-6.)

20           Dobbertin did not offer his expert opinion based on personal knowledge, and did  
21 not state that Loti did not alert at all, but that he believed there should have been more  
22 follow through with the canine after his detection signal. In addition, Dobbertin’s opinion  
23 lacks adequate foundation and is speculative. As such, the Court will not consider it. *See*  
24 *Nelson*, 85 F.3d at 1081-82.

25           Furthermore, Plaintiffs never questioned the training and reliability Loti’s alerts.  
26 Roden and Loti completed the Border Patrols’ Detection Canine Certification. (Exh. B.)  
27 Several times during his deposition, Agent Roden indicated that his dog alerted. (Exh. 7,  
28 Doc. 140-5 at 8, 9, 11, 16-17.) In fact, Plaintiffs’ Statement of Facts states that Roden  
indicated Loti alerted on the front of the vehicle on two separate occasions. (Doc. 139-1

1 at 9-10.) Other than Dobbertin’s speculation that the alert should have been investigated  
2 more completely, there is no evidence of an unreliable canine alert.

3 Even looking at the facts in the light most favorable to Plaintiffs, the Court finds  
4 that Plaintiffs have not shown that a “materially different” fact was excluded from the  
5 probable cause determination. Plaintiffs essentially argue that agents should have  
6 presented Mr. Dobbertin’s conflicting theory that Loti did not alert to the magistrate  
7 judge. This information was neither available nor relevant to whether *at the time* Agent  
8 Roden observed Loti’s alert. Therefore, it is not material to the determination of probable  
9 cause.

10 Plaintiffs further argue that the affidavit should have disclosed that Agent Roden  
11 was predisposed to finding drugs in Plaintiffs’ vehicle because he was forewarned about  
12 a possible drug transport before the stop. Plaintiffs have failed to show that Border  
13 Patrol’s failure to disclose this information was either reckless or deliberate. There are a  
14 multitude of reasons why agents may not disclose the existence of a confidential  
15 informant, these reasons implicate policy considerations. Nonetheless, this information  
16 would not have changed the probable cause determination because Agent Roden  
17 observed his dog alert—not once but twice—onto the grill of the vehicle. The additional  
18 evidence, therefore, is not material to the probable cause determination.

19 • **Drug Testing**

20 First of all, the subsequent lab testing of the windshield wiper fluid is not relevant  
21 to the determination of whether there was probable cause at the time of presentation to  
22 the magistrate judge. Considering subsequent knowledge would undermine evaluating the  
23 situation from the perspective of the agent at the time of arrest. *See Devenpeck v. Alford*,  
24 543 U.S. 146, 152 (2004).

25 Plaintiffs argue that both the negligent testing of the windshield wiper fluid and  
26 agents’ subsequent indecision about whether one test was negative undermined the  
27 probable cause determination. (Doc. 139 at 14-15.) Plaintiffs further contend that agents  
28 should have known and presented their inadequate testing methods and contradictory  
results to the magistrate judge. (Doc. 153 at 9.)

1 Plaintiffs presented deposition testimony of Agents Devin Reno, Brian  
2 Derryberry, and Francisco Mendez-Garcia. Each agent stated that two drug tests were  
3 performed on the windshield wiper fluid, and at least one resulted in a positive test.  
4 (Depo. Reno, Exh. 5 at 39-40, 42; Depo. Derryberry, Exh. 8 at 29, 31, 36; Depo. Mendez-  
5 Garcia, Exh. 9 at 37-38.)

6 Plaintiffs also presented deposition testimony of expert Leo Kadehjian, who  
7 concluded that the drug tests were performed incorrectly and did not result in a reliable  
8 test for methamphetamine. (Doc. 39 at 18-19; Doc. 139-1 at 23.)

9 Like the canine alert, Plaintiffs argue that Defendants should have known that  
10 their drug testing methods were subpar. Furthermore, they should have alerted the  
11 magistrate judge that one of the drug tests was not positive for methamphetamine.  
12 However, there is no assertion that at the time of the test, agents knew the test was  
13 unreliable or that their testing methods were insufficient. Furthermore, all agents stated  
14 that at least one of the tests was positive for methamphetamine.

15 Even though Mr. Kadehjian later noted the administration of the field test was  
16 negligent, this does not demonstrate that the evidence available to the agents at the time  
17 was materially different to that presented at the determination of probable cause. Even if  
18 the agents had informed the court that one of the tests was negative, the agents still  
19 believed at that time that the other test was positive for methamphetamine, establishing  
20 probable cause. Adding the excluded evidence (but not the subsequent revelations) does  
21 not undermine the probable cause determination.

22 Furthermore, agents did not know that their testing methods were faulty, and  
23 therefore Plaintiffs have not demonstrated that the omission was deliberate or reckless.

24 • ***Confession***

25 Plaintiffs argue agents should have informed the magistrate judge that Mr.  
26 Martinez prefaced his confession with a claim of innocence. But, Agent Derryberry did  
27 note that Mr. Martinez maintained his innocence at points in the interrogation. Therefore,  
28 the omission was not materially different.

Even if Agent Derryberry had included Plaintiffs' assertion that Mr. Martinez

1 simultaneously confessed and claimed innocence, this does not undermine the probable  
2 cause determination. Mr. Martinez admitted that he provided a confession (Exh. 1, Doc.  
3 139-3 at 25), and provided details of the illegal transaction (*Id.* at 27-28).

4 Plaintiffs' false imprisonment claim fails as a matter of law because Mr.  
5 Martinez's arrest and detainment was pursuant to valid legal process. Furthermore, even  
6 if the magistrate judge had been given the additional information as Plaintiffs suggest, the  
7 information was not material to the probable cause determination. Due to the  
8 aforementioned, summary judgment is granted to the Government for the claim of false  
9 imprisonment.

10 ***Intentional Infliction of Emotional Distress ("IIED")***

11 "The Ninth Circuit has held that 'the tort of intentional infliction of emotional  
12 distress is not excluded as a matter of law from [the] FTCA by § 2680(h).'" *Sheehan v.*  
13 *United States*, 896 F.2d 1168, 1172 (9th Cir. 1990), *as amended*, 917 F.2d 424 (9th Cir.  
14 1990). District Courts may exercise jurisdiction over FTCA IIED claims, but only if the  
15 underlying conduct for the claim is not an act protected by sovereign immunity. *Sheehan*,  
16 896 F.2d at 1168. To survive summary judgment, a plaintiff must demonstrate that the  
17 agents' actions were intended to inflict emotional distress: In other words, a plaintiff must  
18 plead facts suggesting that agents' actions were motivated by malice. *Gasho*, 39 F.3d  
19 1420, 1434 (9th Cir. 1994).

20 "Under Arizona law, a plaintiff alleging the intentional infliction of emotional  
21 distress must plead and prove that: (1) the defendant's actions were extreme and  
22 outrageous, (2) the defendants either intended to cause emotional distress or acted in  
23 reckless disregard of that result, and (3) severe emotional distress in fact occurred."  
24 *Gasho*, 39 F.3d at 1432, 1171. For conduct to be deemed extreme and outrageous, it must  
25 "go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly  
26 intolerable in a civilized community." *Ford v. Revlon, Inc.*, 734 P.2d 580, 585 (1987).

27 In this instance, Plaintiffs claim agents caused them emotional distress by  
28 separating the family, questioning and threatening incarceration, verbal abuse, offering to  
release the children if Mr. Martinez confessed, continuing the investigation after Mr.

1 Martinez offered a false confession, and Mr. Martinez's subsequent incarceration. (Doc.  
2 20 at 7.)

3 The decision to interrogate is a discretionary decision grounded in the policy  
4 concern of deterring illegal transport of illicit drugs in this country. "The discretionary  
5 function exception covers [investigative determinations of reliability of information]  
6 because “[l]aw enforcement personnel receive warnings, rumors and threats all the time  
7 [and] are constantly required to assess the reliability of the information they receive, and  
8 to allocate scarce personnel resources accordingly." *Gonzalez*, 814 F.3d at 1032-33  
9 (citing *Gasho*, 39 F.3d at 1435). As such, the actions are covered under the discretionary  
10 function exception. *See e.g.*, *Gasho*, 39 F.3d at 1435-36 (affirming summary judgment on  
11 IIED claims resting on actions covered by FTCA exception).

12 In *Gasho v. United States*, plaintiffs raised a genuine issue of whether customs  
13 agents' acts were malicious though testimony of agents stating that agents arrested  
14 plaintiffs not because agents had probable cause, but because plaintiffs made the agents  
mad. 39 F.3d at 1434. In the instant case, agents had probable cause to detain and  
15 interrogate Plaintiffs. Furthermore, the separation and questioning of the Plaintiffs were  
16 plausible tactics to further a criminal investigation.

17 However, Plaintiffs have demonstrated that there is a genuine issue of material  
18 fact as to whether agents' attempts to obtain a confession were outrageous and motivated  
19 by malice. First, Mr. Martinez claims that Agent Casillas screamed at him that all  
20 Mexicans were drug dealers. This statement serves no purpose in furthering agents'  
21 investigation, and suggests malice towards the Martinez family, who are Mexican.  
22 Furthermore, such racially-motivated comments are intolerable in our society, should not  
23 be implemented as a means of interrogation, and could be perceived by a fact-finder as  
24 extreme and outrageous.

25 Second, Plaintiffs allege that the agents: handcuffed Mr. Martinez; continually  
26 shouted accusations at him; threatened to separate his family; told him to "have the balls"  
27 to admit he was transporting drugs; ensured that Mr. Martinez watched the agents  
28 transport his family to another location; and isolated him in a windowless cell. (Doc. 130-

10 at 4-5.) These admissible, detailed allegations bolster Petitioner's claim.

2 Third, Plaintiffs offered deposition testimony of Dr. Richard Leo, who noted that  
3 agents should have known that their interrogation methods employed by agents were  
4 coercive and likely to result in a false confession. (Exh. 12, Doc. 139-8 at 19.) He stated  
5 that agents' testimony and Plaintiffs' testimony varied greatly, with Plaintiffs' version  
6 revealing coercion and intimidation. (*Id.* at 14.)

7 Given these allegations, a finder of fact could determine that agents' interrogation  
8 methods were coercive and overwhelmed Plaintiffs' free will, resulting in a false  
9 confession. If the agents' interrogation was motivated by discriminatory animus, was  
10 coercive, and resulted in a confession that agents were likely to know was false, the  
11 agents' interrogation cannot be protected under the Constitution. The Court finds that  
12 Plaintiffs have raised a genuine issue of material fact as to whether the agents'  
13 interrogation of Mr. Martinez constituted intentional infliction of emotional distress.

14 **Conclusion**

15 Defendants have affirmatively demonstrated that the discretionary function  
16 exception applies to Border Patrol agents' actions as a matter of law as to Plaintiffs'  
17 claims of negligence, gross negligence, assault, and false imprisonment. Furthermore,  
18 Plaintiffs have not raised a genuine issue of material fact affording them judgment on  
19 their claims.

20 Plaintiffs' claim of intentional infliction of emotional distress presents a genuine  
21 issue of material fact, precluding summary judgment.

22 Therefore, IT IS ORDERED:

- 23 1. The Report and Recommendation (Doc. 150) is ADOPTED IN PART;
- 24 2. The Government's Motion for Summary Judgment (Doc. 127) is GRANTED as to  
Plaintiffs' claims of negligence, gross negligence, assault, and false imprisonment.
- 25 3. The Government's Motion for Summary Judgment (Doc. 127) is DENIED as to  
the Plaintiffs' claim of intentional infliction of emotional distress.
- 26 4. The parties shall file a Joint Proposed Pretrial Order within thirty (30) days of the  
date of this Order. A sample Joint Proposed Pretrial Order is attached this Order.

5. A Status Conference is set for Wednesday, August 15, 2018, at 10:30 a.m. in front of the Hon. Cindy K. Jorgenson, Courtroom 5C of the Evo A. DeConcini United States Courthouse, 405 W. Congress Street, Tucson, Arizona 85701.

Dated this 9th day of July, 2018.

Cindy K. Jorgenson

Honorable Cindy K. Jorgenson  
United States District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

8 , )  
9 Plaintiff, )  
10 vs. )  
11 , )  
12 Defendant. )  
13 \_\_\_\_\_)

No. CIV -TUC-CKJ

**PROPOSED SEPARATE/JOINT  
PRETRIAL STATEMENT/ORDER**

Pursuant to the Scheduling Order entered \_\_\_\_\_, 20\_\_\_\_\_, following  
is the Proposed Final Pretrial Statement/Order to be considered at the pretrial conference.

## 16 || A. COUNSEL FOR THE PARTIES

17 || Plaintiff(s):

18 || Defendant(s):

19 | B. STATEMENT OF JURISDICTION

20 Cite the statute(s) that gives the Court jurisdiction, and whether jurisdiction is  
21 disputed.

(E.g.: Jurisdiction in this case is based on diversity of citizenship under Title 28 U.S.C. § 1332. Jurisdiction is (not) disputed.)

## 24 || C. NATURE OF ACTION

Provide a concise statement of the type of case, the cause of the action, and the relief sought.

(E.g.: This is a products liability case wherein the plaintiff seeks damages for personal injuries sustained when he fell from the driver's seat of a forklift. The

1 plaintiff contends that the forklift was defectively designed and manufactured by  
2 the defendant and that the defects were a producing cause of his injuries and  
3 damages.)

4 **D. CONTENTIONS OF THE PARTIES**

5 With respect to each count of the complaint, counterclaim or cross-claim, and to  
6 any defense, affirmative defense, or the rebuttal of a presumption where the burden  
7 of proof has shifted, the party having the burden of proof shall list the elements or  
8 standards that must be proved in order for the party to prevail on that claim or  
9 defense.

10 (E.g.: In order to prevail on this products liability case, the plaintiff must prove the  
11 following elements . . . )

12 (E.g.: In order to defeat this products liability claim based on the statute of repose,  
13 the defendant must prove the following elements . . . )

14 **E. STIPULATIONS AND UNCONTESTED FACTS**

15 **F. CONTESTED ISSUES OF FACT AND LAW**

16 **G. LISTS OF WITNESSES**

17 A jointly prepared list of witnesses, identifying each as either plaintiff's or  
18 defendant's and indicating whether a fact or expert witness, must accompany this  
19 proposed order.

20 A brief statement as to the testimony of each expert witness must be included.

21 **H. LIST OF EXHIBITS**

22 Each party must submit with this proposed order a list of numbered exhibits, with a  
23 description of each containing sufficient information to identify the exhibit, and  
24 indicating whether an objection to its admission is anticipated.

25 Exhibits should be marked according to instructions received from the court.

26 **I. MOTIONS IN LIMINE**

27 Motions in limine shall be filed and served upon each party with this proposed  
28 order. Any opposition shall be filed and served within fourteen (14) days.

**J. LIST OF ANY PENDING MOTIONS**

## **K. PROBABLE LENGTH OF TRIAL**

## L. FOR A BENCH TRIAL

Proposed findings of fact and conclusions of law shall be served and filed on each party with this proposed order.

## **M. FOR A JURY TRIAL**

Stipulated jury instructions shall be filed thirty (30) days before trial. Instructions which are not agreed upon, and a concise argument in support of the instruction, shall be filed and served upon each party thirty (30) days before trial. Objections to the non-agreed upon instructions shall be filed and served upon each party within fourteen (14) days.

## N. CERTIFICATION

The undersigned counsel for each of the parties in this action do hereby certify and acknowledge the following:

1. All discovery has been completed.
  2. The identity of each witness has been disclosed to opposing counsel.
  3. Each exhibit listed herein: (a) is in existence; (b) is numbered, and: (c) has been disclosed and shown to opposing counsel.

## O. ADOPTION

The Court may adopt this proposed Joint Pretrial Order at the Pre-Trial Conference or subsequent hearing.

DATED this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

**APPROVED AS TO FORM AND CONTENT**

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Attorney for Plaintiff

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**Attorney for Defendant**